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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **FT. HARRISON'S BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), through its counsel of record, hereby files this brief in support of its motion for temporary restraining order and preliminary injunction for the Court's consideration. The Court should grant Ft. Harrison's motion to prevent the Montana Board of Housing (the "Board") from allocating low income housing tax credits ("LIHTC") for 2013 because Ft. Harrison meets the requirements of § 27-19-201, MCA. The Court should also waive the bond requirement because there will be no damages incurred as a result of a preliminary injunction in this case.

BACKGROUND

The allocation of LIHTCs is governed by 26 U.S.C. § 42. This statute requires LIHTCs be issued each year "pursuant to a [QAP]." 26 U.S.C. § 42(m)(1)(A). The QAP must "set[] forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." *Id.* § 42(m)(1)(B). The Board establishes the QAP annually. Although Federal law requires the QAP include certain selection criteria to determine housing priorities, the Board determines the specific provisions of each selection criterion. Beginning in 2013, the Board elected to use the term evaluation criteria, instead of selection criteria. Pursuant to the terms of the QAP, the Board's staff "evaluate[s] each project for conformance with the criteria in the QAP, using the point system provided therein." ARM 8.111.603(3). The Board then allocates the LIHTCs. The Board generally awards the LIHTCs based upon these points.

On January 20, 2012, Ft. Harrison submitted its application for Montana LIHTCs. Aff. of Donald Paxton, p. 2, ¶ 2, attached hereto as **Exhibit A**. Ft. Harrison planned to develop a housing project to serve low income, homeless and/or disabled veterans and their families in historic buildings located on Fort Harrison, outside of Helena, Lewis and Clark County, Montana (the "Freedoms Path Project"). *Id.* at 2, ¶ 3. The land Ft. Harrison intends to use for the Freedoms Path Project is currently owned by the Federal Government. *Id.* at 2, ¶ 4. Ft. Harrison's right to use the land is conditioned on whether the Federal Government considers the Freedoms Path Project is viable. *Id.* If the Federal Government determines the Freedoms Path Project is not viable, it may terminate Ft. Harrison's right to use the land at any time. *Id.*

For reasons explained in Ft. Harrison's brief in support of its motion for summary judgment, the Board denied Ft. Harrison request for LIHTCs for the Freedom's Path Project in 2012. *See generally* Ft. Harrison's Br. in Supp. of Mot. for Summ. J.

After requesting the Board reconsider its decision, Ft. Harrison filed a petition for judicial review and declaratory judgment on May 9, 2012 ("Original Petition"), asking the Court to reverse the Board's decision, award Ft. Harrison the LIHTCs it requested, and declare portions of the 2012 QAP invalid. Pet. and Demand for Jury Trial, pp. 5-6. That litigation is currently pending before the Court.

After Ft. Harrison filed its Original Petition, the Board began the process of establishing a new QAP for 2013. The Board conducted several meetings to consider comments regarding the provisions of the 2013 QAP. *See* 2013 QAP, p. 1. At its August 16, 2012, meeting, the Board approved public notice and distribution of the 2013 QAP. *Id.*

At its October 15, 2012, meeting, the Board accepted public comment on the 2013 QAP. *Id.* A representative of Ft. Harrison voiced numerous concerns, including that the 2013 QAP contains unconstitutional provisions. Paxton Aff., p. 2, ¶ 8. Despite Ft. Harrison's comments, the Board approved the 2013 QAP for submission to the Montana Governor. 2013 QAP, p. 1. The Governor approved the 2013 QAP on October 26, 2012. *Id.*

The Board then proposed the amendment of administrative rules 8.111.602 and 8.111.603 to formally incorporate the 2013 QAP for use in the 2013 LIHTC allocation process. The Board promulgated these amendments pursuant to the Montana Administrative Procedures Act. *See* MAR Notice No. 8-111-106. During the period designated for public comment, Ft. Harrison, through its representatives, objected to the proposed amendments, citing concerns that provisions of the 2013 QAP are unconstitutional. Paxton Aff., p. 3, ¶ 9; Ex. B to Paxton Aff., Letter from

Michael Green to Mary Bair (Dec. 6, 2012). In response, the Board disagreed with Ft. Harrison's objections and adopted the 2013 QAP and administrative rules as proposed. *See* MAR Notice No. 8-111-106.

As adopted and formally incorporated by administrative rule, the 2013 QAP contains numerous provisions Ft. Harrison challenges in its supplemental petition for declaratory judgment ("Supplemental Petition"). As fully set forth below, these provisions include Evaluation Criteria No. 7, Demonstration of a Montana Presence, and Evaluation Criteria No. 3, Project Location. 2013 QAP, pp. 21, 23-24.

For the first time, the Board also included Corrective Award provision in the 2013 QAP. 2013 QAP, p. 17. The Corrective Award was established in response to the litigation resulting from Ft. Harrison's Original Petition. It allows 2013 LIHTCs to be awarded to projects submitted in prior years under the following circumstances:

> [1] a final order of a court of competent jurisdiction determines or declares that such applicant was entitled to an award in such prior round or year or requires the Board to make an award or allocation of tax credits to such project;
>
> [2] a final order of a court of competent jurisdiction invalidates or sets aside an award of credits to an approved project from such prior round or year and a reservation agreement was executed by the Board and such applicant prior to issuance of such court order, unless such court order determines that such project was not eligible or qualified under the applicable QAP to receive an award of tax credits; or
>
> [3] the Board, upon further consideration of any award determination as required by and in accordance with the order of a court of competent jurisdiction, determines that such project was entitled to an award in such prior round or year.

Id. The LIHTCs are awarded first from "returned or unreserved tax credits from a prior year" and then are awarded from the 2013 LIHTCs. *Id.* However, all 2012 LIHTCs have been reserved, and Ft. Harrison is unaware of any returned LIHTCs, leaving only the 2013 LIHTCs to fill the remedy provided in the Corrective Award provisions. Paxton Aff., p. 2, ¶ 8.

Accordingly, the 2013 LIHTCs stand as the remedy to the litigation resulting from the Original Petition, if the Court finds in Ft. Harrison's favor. Since the Board maintains control over the provisions of the QAP, it is unclear whether a Corrective Award provision will be included in future versions of the QAP.

ARGUMENT

The Court should grant Ft. Harrison's motion for a temporary restraining order and preliminary injunction because Ft. Harrison meets the necessary criteria under § 27-19-201, MCA. The Court should also waive the bond requirement because there will be no damages incurred as a result of a preliminary injunction in this case.

I. THE COURT SHOULD GRANT FT. HARRISON'S MOTION BECAUSE FT. HARRISON QUALIFIES FOR A PRELIMINARY INJUNCTION, PURSUANT TO § 27-19-201(1), (2) AND (3), MCA.

Under Montana law, a preliminary injunction may be granted in the following cases:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
>
> . . . .

§ 27-19-201, MCA.

The Montana Supreme Court "has held that only one of these subsections need be met for an injunction to be issued." *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 15, 319 Mont. 419, 47 P.3d 809 (citing *Sweet Grass Farms v. Bd. of Cnty. Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825). "The purpose of preliminary injunctive relief is to maintain the

status quo pending the final outcome of the litigation." *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 25, 348 Mont. 68, 199 P.3d 810.

District courts are vested with a "high degree of discretion" regarding preliminary injunctions. *Shammel*, ¶ 12 (internal quotation marks omitted). Accordingly, their decisions will not be overturned upon appeal unless there is a "manifest abuse of discretion," meaning abuse is "obvious, evident or unmistakable." *Id.* (internal quotation marks omitted).

First, Ft. Harrison qualifies for a preliminary injunction under § 27-19-201(1), MCA, because it appears to be entitled to an award under its Original Petition and its Supplemental Petition and the relief depends upon restraining the Board from allocating the 2013 LIHTCs. Ft. Harrison also qualifies for an injunction pursuant to § 27-19-201(2), MCA, because allowing the Board to allocate the 2013 LIHTCs would greatly or irreparably injure Ft. Harrison by destroying the remedy set aside for Ft. Harrison if the Court finds in its favor regarding the Board's 2012 LIHTC allocation decision and potentially rendering the Freedoms Path Project unviable. Finally, Ft. Harrison meets the elements of § 27-19-201(3), MCA, because the Board intends to allocate the 2013 LIHTCs based on unconstitutional provisions of the 2013 QAP. This would render judgment ineffectual in this matter because it is precisely the action Ft. Harrison seeks to prevent in its Supplemental Petition.

A. Ft. Harrison qualifies for a preliminary injunction, pursuant to § 27-19-201(1), MCA.

Ft. Harrison is entitled to relief demanded under its Original Petition and its Supplemental Petition. Under Montana law, to grant a preliminary injunction, the Court does not have to be convinced that the movant will certainly prevail in on the merits of the suit. *Boyer v. Karagacin*, 178 Mont. 26, 33, 582 P.2d 1173, 1177-78 (1978), *overruled on other grounds by Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912. In

Boyer, the Montana Supreme Court upheld the district court's continuance of an injunction under nearly identical statutory language. *Id.* at 35, 582 P.2d at 1178. There, a business owner claimed to have lost business because the defendant parked in a manner that blocked access to the business. *Id.* at 33, 582 P.2d at 1178. In response, the business owner obtained a temporary restraining order from a district court. *Id.*

In discussing the standards necessary to issue a preliminary injunction, the Montana Supreme Court held "the court should be inclined to issue a temporary injunction applied for where the plaintiff has made out a prima facie case . . . it is not necessary that a case be made which would entitle him to relief at all events on final hearing." *Id.* at 33, 582 P.2d at 1177 (internal quotation marks omitted) (quoting *Atkinson v. Roosevelt Cnty.*, 66 Mont. 411, 422, 214 P. 74, 77 (1912)). It continued by stating, "[i]t is not necessary that the court be satisfied that the plaintiff will certainly prevail on the final hearing; a probable right, and a probable danger that such right will be defeated without the special interposition of the court, is all that need be shown." *Id.* at 33, 582 P.2d at 1177-78 (internal quotation marks omitted) (quoting *Atkinson v. Roosevelt Cnty.*, 66 Mont. 411, 422, 214 P. 74, 77 (1912)).

Ft. Harrison has met the standard set out in *Boyer* regarding the claims in its Original Petition. It is not necessary that Ft. Harrison show it is absolutely entitled to judgment to satisfy this element. Ft. Harrison's arguments relating to the Board's 2012 LIHTC allocation decision have been fully briefed and are incorporated by reference into this brief. They provide more than the necessary prima facie showing required for the Court to grant a preliminary injunction.

In addition, Ft. Harrison satisfies the statutory requirement that the relief consists of restraining the Board from proceeding with the 2013 LIHTC allocation process. The 2013 LIHTCs provide the remedy if the Court finds in favor of Ft. Harrison. As explained above, the

Corrective Award provision of the 2013 QAP provides that the Board must set aside 2013 LIHTCs if required by court order. Permitting the Board to allocate the 2013 LIHTCs before the Court's decision, however, eliminates this remedy. In addition, the Board has previously taken the position that once LIHTCs are allocated, the Board has no authority to retrieve them and the Court does not have subject matter jurisdiction to hear the issue. *See* Resp't's Br. in Supp. of Mot. to Dismiss, pp. 6-9; Resp't's Reply Br. in Supp. of Mot. to Dismiss, pp. 6-8. A preliminary injunction is necessary to avoid these same argument in the future. Therefore, The Court should enjoin the 2013 LIHTC allocation process to prevent this from occurring.

Alternatively, Ft. Harrison has also met this standard regarding its Supplemental Petition, which sets out a prima facie case for why the Court should invalidate the 2013 QAP and the corresponding administrative rules, as well as enjoin the 2013 LIHTC allocation process. These arguments are further detailed in this brief and are supported by the affidavit of Donald Paxton, filed contemporaneously. At a minimum these argument establish a probable right, which must be protected by special interposition of the Court.

The relief requested in the Supplemental Petition also consists in restraining the Board from conducting the 2013 LIHTC allocation process. The Supplemental Petition asks the Court to invalidate the 2013 QAP and the corresponding administrative rules as well as issue the injunction that is the subject of this brief. Permitting the Board to proceed with the 2013 LIHTC allocation process is precisely what Ft. Harrison seeks to avoid. As a result, the Court must restrain the Board from moving forward.

Therefore, under either the Original or the Supplement Petition, Ft. Harrison meets the requirements of § 27-19-201(1), MCA, and the Court should grant its motion for preliminary injunction.

B. Ft. Harrison qualifies for a preliminary injunction, pursuant to § 27-19-201(2), MCA.

Permitting the Board to conduct the 2013 LIHTC allocation process would greatly or irreparably injure Ft. Harrison. The standard for showing irreparable injury under Montana law is also discussed in *Boyer*. There, the Montana Supreme Court stated, "the court should be inclined to issue a temporary injunction . . . if[] upon the showing made, [the Court] is left doubtful whether or not the plaintiff will suffer irreparable injury before his rights can be fully investigated and determined." *Boyer, 178 Mont.* at 33, 582 P.2d at 1177 (internal quotation marks omitted) (quoting *Atkinson v. Roosevelt Cnty.*, 66 Mont. 411, 422, 214 P. 74, 77 (1912)).

Ft. Harrison will be greatly or irreparably injured if the 2013 LIHTCs are allocated before the Court has an opportunity to issue a decision relating to Ft. Harrison's Original or Supplemental Petition. Regarding the Original Petition, and as explained above, if the Court finds in favor of Ft. Harrison, the 2013 LIHTCs provide Ft. Harrison's remedy. Allowing the Board to allocate the 2013 LIHTCs will permanently foreclose Ft. Harrison's ability to construct the Freedoms Path Project. Without an award of LIHTCs, the Freedoms Path Project is not viable. Paxton Aff., p. 3, ¶ 11.

Moreover, a future award of LIHTCs is insufficient to preserve Ft. Harrison's rights. As of the filing of this brief, it is unclear whether a future allocation of LIHTCs will be possible. Including a Corrective Award provision in a future QAP requires numerous steps and cannot be assured at this time. First, the Board must formally include the provision and approve the QAP. However, the terms of four Board members, including the chairman, expired as of January 1, 2013. *See* MONTANA BOARD OF HOUSING DIRECTORS, http://housing.mt.gov/About/MBOH/members.mcpx (last visited January 8, 2013). Future Board members may have different views regarding the contents of the QAP and will be appointed to the Board by a different Governor.

See id. Next, the Governor must approve the QAP. A new Montana Governor was sworn in on January 7, 2013, and his views on these provisions are unclear. Finally, the Board must incorporate the QAP for future use through formal rulemaking. The QAP and administrative rules are also subject to legal challenges during and after this process. Finally, the new Board must make the allocation. If for any reason a future award is unavailable, Ft. Harrison will again be required to expend time and resources in litigation to secure its rights.

In addition, the land Ft. Harrison plans to use for the Freedoms Path Project is owned by the Federal Government. Ft. Harrison's right to use the land is conditioned on whether the Federal Government considers the Freedoms Path Project viable. If the Federal Government determines the Freedoms Path Project is not viable, it may terminate Ft. Harrison's right to use the land at any time, permanently foreclosing construction. Ft. Harrison has already suffered a substantial delay after being erroneously denied LIHTCs for 2012. Further delays of the LIHTC award postpones construction and potential revenues, raising the risk the Federal Government will terminate the lease. Considering these things, Ft. Harrison meets the standard set out in *Boyer* regarding the Original Petition, and the Court should not allow the Board to proceed with the 2013 LIHTC allocation process.

Alternatively, regarding the Supplemental Petition, Ft. Harrison will be greatly or irreparably injured if the Board proceeds with the 2013 LIHTC allocation process because the LIHTCs will be allocated on a basis that discriminates against Ft. Harrison. As set out more fully below, the vagueness of the provisions of the 2013 QAP prevent Ft. Harrison from making a proper determination as to whether it should submit an application to the Board for 2013 LIHTCs or what attributes its application and corresponding project should possess. Also as explained below, even if Ft. Harrison decides to submit an application for 2013 LIHTCs, as an

out-of-state developer, Ft. Harrison will be discriminated against by 2013 QAP provisions. Therefore, the Court should enjoin the 2013 LIHTC allocation process to preserve Ft. Harrison's rights and the status quo during the pending litigation.

C. Alternatively, Ft. Harrison qualifies for a preliminary injunction, pursuant to § 27-19-201(3), MCA.

The Board is attempting to allocate the 2013 LIHTCs on unconstitutional grounds, which implicate Ft. Harrison's rights and would render the Court's judgment ineffectual. The 2013 QAP provides the criteria the Board must use to allocate the LIHTCs in 2013. These criteria include two types of unconstitutional provisions. First, provisions of the 2013 QAP facially violate the Dormant Commerce Clause by granting points to in-state developers, and denying those points to out-of-state developers, such as Ft. Harrison. Second, several of the provisions of the 2013 QAP are unconstitutionally vague. These provisions require Ft. Harrison, and other applicants, to guess at their meaning. As a result, Ft. Harrison cannot reasonably determine whether it can properly apply for LIHTCs during the 2013 allocation process or what attributes its project and application must possess to qualify for 2013 LIHTCs.

1. Evaluation Criteria No. 7 of the 2013 QAP, Demonstration of a Montana Presence, violates the Dormant Commerce Clause.

The 2013 QAP contains Evaluation Criteria No. 7, Demonstration of a Montana Presence, which awards points to developers within Montana. It states:

> Key members of the applicant's development team have a presence in Montana. For purposes of this section, Montana presence means that a **team member has a physical presence of some kind in the state of Montana, such as owning an affordable housing project in Montana with a demonstrated quality product, being licensed in Montana (e.g., a licensed contractor), maintaining an office or operation in Montana or other presence in Montana indicating familiarity and experience with development or project operation in Montana.** Montana presence does not mean or require that applicants, developers or team members must be Montana businesses, entities or residents.

> This section is intended to assist in providing a better quality product for the intended beneficiaries of the program, *i.e.*, persons needing and qualifying for low-income housing. This section, consistent with the purposes of MBOH and federal law, is intended to assure the ability of the development team to successfully plan, permit, develop, construct and bring a project into service in the local Montana building environment within the applicable time limits and in compliance with all requirements.
>
> - The application must include a description of the role in the project of each member claimed to have a Montana presence and documentation that each such team member is qualified for such role and essential for the overall development of the property. (0-5 points maximum):
> - Developer or Project Manager with responsibility for overall development or management of project. (2 points if either Developer or Project Manager has Montana presence)
> - Contractor or Construction Manager with contractor or management responsibility for overall project (2 points if either Contractor or Construction Manager has Montana presence)
> - Consultant, Syndicator, Attorney, Accountant, Architect and/or Engineer (1 point if one or more of specified professionals has Montana presence)

2013 QAP, pp. 23-24 (emphasis added).

In evaluating a claim for facial violation of the Dormant Commerce Clause, the initial question is whether the law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). The United States Supreme Court has stated numerous times that facially discriminatory laws are subject to a "virtually *per se* rule of invalidity" and must be invalidated unless the state can show the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)); *see also Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). " . . . [D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at 99.

The Demonstration of a Montana Presence evaluation criteria in the 2013 QAP is subject to the highest scrutiny because it facially discriminates against interstate competition. This provision benefits in-state developers, and burdens out-of-state developers, by providing an advantage "if a member of its development team is Montana based." 2013 QAP, p. 23. This is not even-handed regulation, as required by the Commerce Clause. It is discriminatory, and it directly disadvantages out-of-state applicants such as Ft. Harrison. Accordingly, the provision is *per se* invalid.

This argument is bolstered by the Board's overt preference for in-state businesses. At the Board's October 15, 2012, meeting, it considered removing the Demonstration of a Montana Presence criteria from the 2013 QAP. During the discussion, Board member Shiela Rice stated, "I also think the development community thrives in Montana and that is a very important piece for all Montanans . . . a strong development community." Audio Recording of October 15, 2012, meeting at 3:02:05. These statements violate the fundamental purpose of the Dormant Commerce Clause, that simple economic protection is intolerable and that no state may provide direct commercial advantage to local business. *See Maryland v. Louisiana*, 451 U.S. 725, 754, 760 (1981); *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978).

Moreover, the Board's attempt to sanitize these criteria has no merit. Directly after the offensive provisions cited above, the 2013 QAP states, "Montana presence does not mean or require that applicants, developers or team members must be Montana businesses, entities or residents." However, the discrimination need not require developers to be Montana business or residents to violate the Dormant Commerce Clause. The law clearly states that when discrimination is present, meaning differential treatment of in-state and out-of-state economic

interests that benefits the former and burdens the latter, then the provision is unconstitutional and must be invalidated. Nothing more is necessary.

Furthermore, the Board's justification of the offensive provision also fails. The Board attempts to justify the criteria by claiming that advantaging in-state interests will "assist in providing a better quality product" and "is intended to assure the ability of the development team to successfully plan, permit, develop, construct and bring a project into service in the local Montana building environment within the applicable time limits and in compliance with all requirements." 2013 QAP, p. 24. This claim is simply false. It is illogical to assume that all out-of-state applicants are necessarily unable to successfully bring their projects to completion without the help of a Montana-based team member. Out-of-state developers are not incapable of performing construction in another state or familiarizing themselves with local rules and regulations. The Board's claim fails to cure these unconstitutional provisions of the 2013 QAP.

Also, these criteria fail to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. There are numerous alternatives the Board may use to ensure projects are planned, permitted, developed, constructed and brought into service successfully without discriminating against out-of-state applicants. For example, the Board could require that the applicants have a certain amount of experience, that permits be secured in advanced, or that the applicants meet certain criteria to ensure the project is advanced as anticipated. Some of these options are already present in the 2013 QAP. This discriminatory provision is simply unnecessary, and the Court should not allow it to influence the Board's award of LIHTCs in 2013.

As a final note, Ft. Harrison's rights are directly implicated by these unconstitutional provisions. Ft. Harrison is an out-of-state developer. As a result, it is prejudiced by the presence

of such discriminatory criteria in the 2013 QAP. The Court should therefore enjoin the Board from using the 2013 QAP until it rules on Ft. Harrison's Supplemental Petition.

2. Several provisions of the 2013 QAP are unconstitutionally vague.

Under Montana law, "[a] noncriminal statute or regulation is unconstitutionally vague if a person of common intelligence must necessarily guess at its meaning. However, a term is not vague simply because it can be dissected or subject to different interpretations. This Court is required to uphold the constitutionality of a statute when that can be accomplished by a reasonable construction of the statute." *Mont. Media, Inc. v. Flathead Cnty.*, 2003 MT 23, ¶ 58, 314 Mont. 121, 63 P.3d 1129 (internal citations omitted) (citing *Broers v. Dep't of Revenue*, 237 Mont. 367, 371, 772 P.2d 320, 323 (1989)).

Numerous provisions of the 2013 QAP are so vague or contradictory that they require Ft. Harrison and other applicants to guess at the meaning. These provisions include Evaluation Criteria No. 3, Project Location. This provision states as follows:

> Development is located in an area where amenities and/or essential services will be available to tenants (schools, medical services, shopping, grocery store, bank, police, fire station, transportation, **etc.**). In evaluating the development location under this section, consideration will include the include the relative proximity of the development to such amenities and essential services and/or the availability of public or contracted transportation to such amenities and services, the targeted tenant population **and other relevant factors**." 2013 QAP, p. 21 (emphasis added).

2013 QAP, p. 21 (emphasis added).

Given this language, applicants for 2013 LIHTCs cannot determine what criteria will be used to evaluate their respective applications. The phrase "other relevant factors" offers no indication of what considerations will be used to evaluate the location of the proposed project. Likewise, use of terms such as "etc." do not offer any indication of what amenities are necessary to secure the offered points. Allowing such vague and open-ended criteria to determine the

allocation of millions of dollars in tax credits serves only to increase the risk of arbitrary application and future litigation of the 2013 QAP provisions.

In addition, some provisions of the 2013 QAP are vague because they directly conflict with other provisions. For example, the 2013 QAP requires applications "[b]e complete" and "received by the deadline date" to qualify for further consideration. 2013 QAP, p. 19. However, on the same page, the 2013 QAP states that applications will qualify for further consideration if they are not "substantially incomplete." *Id.* This leaves applicants to guess as to which standard will be applied during the 2013 LIHTC allocation process.

The 2013 QAP is also unconstitutionally vague regarding how scoring will be applied. For example, Evaluation Criteria No. 5, Project Characteristics, contains several points that are designated "threshold" or "discretionary," respectively. *See* 2013 QAP, pp. 22-23. However, there is no indication in the 2013 QAP whether threshold scoring must be received before discretionary scoring may be awarded, or if so, how many threshold points are necessary to become eligible for discretionary points. Applicants can only guess as to the meaning of these provisions. Given the arbitrary manner in which this scoring has been applied in the past, and the resources required to determine how these vague provisions were applied, the Court should find these provisions do not meet the standard set by the Montana Supreme Court. These provisions are not simply subject to different or reasonable interpretations. They offer no indication of the criteria the Board will apply in evaluating the applications, are contradictory to other provisions of the 2013 QAP, or are simply silent on how they will be applied.

These unconstitutional provisions directly implicate Ft. Harrison's rights in that they prevent Ft. Harrison, or any other applicant, from being able to reasonably determine whether applying for 2013 LIHTCs is appropriate. If Ft. Harrison decides to apply, it remains unclear

what criteria will be used or how the applications will be scored. Given these concerns, the Court should grant Ft. Harrison's motion until the Court rules on Ft. Harrison's supplemental petition for declaratory judgment.

Employing these unconstitutional provisions renders the Court's judgment as to Ft. Harrison's Supplemental Petition ineffectual. Preventing the Board from using these unconstitutional criteria is precisely the relief prayed for in Ft. Harrison's Supplemental Petition. Therefore, the Court must grant Ft. Harrison's motion until it has an opportunity to rule on the Supplemental Petition.

II. THE COURT SHOULD NOT REQUIRE A BOND FROM FT. HARRISON BECAUSE THERE WILL BE NO DAMAGES IF THE BOARD IS ENJOINED FROM CONDUCTING THE 2013 LIHTC ALLOCATION PROCESS.

Although a bond is generally required when the Court orders a preliminary injunction, the statute grants the Court the authority to set the bond "at a sum the judge considers proper" or to waive the bond requirement "in the interest of justice." § 27-19-306, MCA. "The purpose of . . . requiring the party who is granted a [temporary restraining order] or injunction to post bond is to cover the cost of damages that may be suffered by a party who is wrongfully enjoined or restrained." *Marketing Specialists, Inc. v. Serv. Marketing of Mont., Inc.*, 214 Mont. 377, 387, 693 P.2d 540, 546 (1985).

The Court's decision whether to require a security bond "will not be overturned absent an abuse of discretion." *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 21, 303 Mont. 342, 16 P.3d 342 (citing *May v. First Nat'l Pawn Brokers, Ltd.*, 270 Mont. 132, 134, 890 P.2d 386, 388 (1995)). The Court also enjoys "wide discretion in setting the amount of the bond, and, in certain cases, may reduce the bond to zero." *Montana Silversmiths, Inc. v. Taylor*

Brands, LLC, 850 F.2d 1172, 1189 (D. Mont. 2012) (citing *Connecticut General Life Ins. Co. v. New Images of Beverly Hills,* 321 F.3d 878, 882 (9th Cir. 2003)).

In *Four Rivers*, the Montana Supreme Court affirmed a district court's decision to waive the bond requirement for a preliminary injunction. *Four Rivers*, ¶ 24. There, a seed company sought an injunction to prevent a farming operation from producing and certifying a certain class of crop, in order to limit its sale and use. *Id.* ¶ 9. The district court granted the injunction and determined that requiring a bond would be unfair. *See id.* ¶¶ 17, 21, 23.

In upholding the district court's decision, the Montana Supreme Court held that since the district court considered all the evidence, and since the farming operation was not deprived of property or profit, the district court did not abuse its discretion when it waived the bond requirement. *Id.* ¶ 23.

In this case, the Court should either waive the bond requirement or reduce the bond amount to zero because there are no potential damages. The Board has no financial stake in pursuing the 2013 LIHTC allocation process. Like the farming operation in *Four Rivers*, the Board will not be deprived of any property or profits as a result of the preliminary injunction. Neither will any other applicants suffer damages because of the injunction. The 2013 LIHTC allocation process has not yet begun. As of the date of this filing, Ft. Harrison is unaware of any applications that have been filed. Even if applications are filed, however, the Board has taken the position that no applicant has a due process interest in the allocation of LIHTCs. *See* Resp't's Br. in Supp. of Mot. to Dismiss, pp. 11-14; Resp't's Reply Br. in Supp. of Mot. to Dismiss, pp. 13-14. Therefore, there can be no damages if the Court grants Ft. Harrison's motion. As in *Four Rivers*, considering all of this evidence, requiring a bond from Ft. Harrison would be unfair.

III. THE COURT SHOULD GRANT FT. HARRISON'S REQUEST FOR A TEMPORARY RESTRAINING ORDER UNTIL THE COURT ISSUES A DECISION REGARDING THE PRELIMINARY INJUNCTION.

Under Montana law, "[w]here an application for an injunction is made . . . the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order." § 27-19-314, MCA. Similar to a preliminary injunction, "[i]t is well settled that the purpose of the temporary restraining order is to preserve the status quo until a hearing can be had and a decision made as to whether an injunction pendent lite should be granted." *Boyer*, 178 Mont. at 32, 582 P.2d at 1177 (citing *State ex rel. McKenzie v. Dist. Ct.*, 111 Mont. 241, 107 P.2d 885 (1940).)

Accordingly, Ft. Harrison requests that the Court issue a temporary restraining order preventing the Board from conducting the 2013 LIHTC allocation process until the Court has an opportunity to issue its decision regarding this motion. The issuance of a temporary restraining order is extremely time sensitive; the application submission deadline for the 2013 LIHTC allocation process is January 18, 2013. A temporary restraining order must be put into the place immediately to preserve the status quo and Ft. Harrison's rights in this matter.

CONCLUSION

For all these reasons, the Court should grant Ft. Harrison's motion for temporary restraining order and preliminary injunction.

Dated this 8th of January, 2013.

CROWLEY FLECK PLLP

By _____
Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 31st day of January, 2013, I had mailed via U.S. Mail a true and correct copy of the foregoing to the following:

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Attorneys for Ft. Harrison Veterans Residence, L.P.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **AFFIDAVIT OF DONALD PAXTON**

STATE OF FLORIDA)
:ss
County of Sarasota)

I, Donald Paxton, declare and state under penalty of perjury as follows:

1. I am the sole member of Beneficial Ft. Harrison Residences LLC, Communities, LLC, the general partner of Ft. Harrison Veterans Residence Limited Partnership ("Ft. Harrison").

EXHIBIT
tabbies
A

2. Ft. Harrison submitted its application for low income housing tax credits ("LIHTC") with the Montana Board of Housing (the "Board") on January 20, 2012, pursuant to the Qualified Allocation Plan ("QAP") in effect for the 2012 LIHTC allocation process.

3. Ft. Harrison planned to develop a housing project to serve low income, homeless and/or disabled veterans and their families in historic buildings located on Fort Harrison, outside of Helena, Lewis and Clark County, Montana (the "Freedoms Path Project").

4. The land Ft. Harrison intends to use for the Freedoms Path Project (the "Land") is currently owned by the Federal Government. *See* Enhanced-Use Lease, a true and correct copy of which is attached to this affidavit as **Exhibit A**. Ft. Harrison's right to use the Land is conditioned on whether the Federal Government considers the Freedoms Path Project viable. *Id.* at 2, Art. 1G. If the Federal Government determines the Freedoms Path Project is not viable, it may terminate Ft. Harrison's right to use the Land at any time. *Id.*

5. The Board denied Ft. Harrison's application for 2012.

6. After requesting the Board reconsider its decision, Ft. Harrison filed a petition for judicial review and declaratory judgment on May 9, 2012, asking the Court to reverse the Board's decision, award Ft. Harrison the LIHTCs it requested, and declare portions of the 2012 QAP invalid. This litigation is currently pending before the Court.

7. Ft. Harrison is unaware of any LIHTCs that have been returned or that have not been reserved for 2012.

8. After the Board approved the 2013 QAP for public notice and distribution, a representative of Ft. Harrison attended the Board's October 15, 2012, meeting in Missoula Montana and offered oral public comment. Ft. Harrison's represented voiced numerous concerns on its behalf, including that the 2013 QAP contains unconstitutional provisions.

9. When the Board proposed the amendment of administrative rules 8.111.602 and 8.111.603, a representative of Ft. Harrison again opposed these rules by a written letter on December 2, 2012, a true and correct copy of which is attached to this affidavit as **Exhibit B**.

10. Ft. Harrison will be irreparably harmed if the Board is permitted to conduct the LIHTC allocation process for 2013.

11. Ft. Harrison understands that 2013 LIHTCs will be awarded to Ft. Harrison if the Court finds in Ft. Harrison's favor regarding the Board's allocation decision for 2012. Without an award of LIHTCs, the Freedoms Path Project is not viable.

12. If the Federal Government determines the Freedoms Path Project is not viable, as a result of the Board allocating the 2013 LIHTCs, the Federal Government may revoke Ft. Harrison's right to lease the Land. This would foreclose Ft. Harrison's ability to construct the Freedoms Path Project

13. Considering the vague nature of the criteria currently found in the 2013 QAP, Ft. Harrison is currently unable to make a reasonable decision whether it should submit an application for the 2013 LIHTC allocation process. It is unclear to Ft. Harrison what criteria will be used to evaluate the 2013 applications or how the criteria will be applied.

14. In addition, even if Ft. Harrison applies for 2013 LIHTCs, Ft. Harrison understands it will be disadvantaged by provisions of the current 2013 QAP that violate the interstate commerce clause of the U.S. Constitution.

DATED this 8th day of January, 2013.

Donald Paxton

SUBSCRIBED and SWORN to before me this 8th day of January 2013.

(SEAL)

Notary Public for the State of FL
Printed Name: J. VAN HORN
Residing at: 2206 Jo Anne Lynne
My Commission Expires: 2/19/2016